No.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-979

ARTHUR G. McKEE & COMPANY,

Petitioner,

v.

G.C.S., INC., I.S.C., INC., McJUNKIN CORPORATION, and the HON. DANIEL J. SNYDER, JR., United States District Judge for the Western District of Pennsylvania,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Arthur G. McKee & Company petitions that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on October 28, 1976.

OPINIONS BELOW AND IN COMPANION CASES

The judgment of the United States Court of Appeals for the Third Circuit is printed in Appendix 1. (App. 1-2). The opinions and orders of the United States District Court

for the Western District of Pennsylvania (Snyder, J.) dated March 22, 1976, June 18, 1976, and July 21, 1976 are printed in Appendices 2, 3, and 4, respectively. (App. 3-10, App. 11-14, and App. 15-16). The opinion and order of the United States District Court for the Northern District of Illinois in a companion case captioned *Arthur G. McKee & Co.* v. *G.C.S., Inc.*, is printed in Appendix 5. (App. 17-20). The opinion and order of the United States District Court for the Western District of Pennsylvania (Sorg, C. J.) in a companion case captioned *G.C.S., Inc.* v. *Arthur G. McKee & Co.* is printed in Appendix 6. (App. 21-25). The opinion and order of the Court of Common Pleas of Allegheny County, Pennsylvania in a companion case captioned *Honeywell, Inc.* v. *G.C.S., Inc., et al.* v. *Arthur G. McKee & Company* is printed in Appendix 7. (App. 26-28). None of these opinions is reported.

JURISDICTION

The Third Circuit's judgment was entered on October 28, 1976. (App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented for review by this Court are:

1. Whether, after this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), a federal court may refuse to enforce a contractual forum selection clause in a third-party action brought under F.R.Civ.P. 14(a), on the ground that the issue arises in the context of a third-party action, even though that clause has been expressly held reasonable and enforceable as between the parties to the third-party action by other federal courts in earlier-filed related cases.

2. Whether, under this Court's decisions in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U.S. 449 (1935), an order refusing to enforce a binding, contractual forum-selection clause is immediately reviewable on appeal under 28 U.S.C. §1291 or 28 U.S.C. §1292(a)(1).

RULE AND STATUTES INVOLVED

The rule and statutory provisions involved are F.R.Civ. P. 14(a) and 28 U.S.C. §§1291 and 1292(a)(1). They provide in relevant part:

F.R.Civ.P. 14(a):

> "When Defendant may Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . Any party may move to strike the third-party claim, or for its severance or separate trial. . . ."

28 U.S.C. §1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

28 U.S.C. §1292(a)(1):

> "The courts of appeals shall have jurisdiction of appeals from:
>
> > "Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

Introduction

This petition involves a disagreement among three district court judges in two different judicial circuits as to where a contract dispute between petitioner Arthur G. McKee & Company and respondent G.C.S., Inc. should be litigated.* All three judges had before them actions arising under a construction subcontract between McKee as general contractor and G.C.S. as subcontractor. In a forum-selection clause in the subcontract, McKee and G.C.S. agreed to consolidate all disputes arising out of their contract before a single forum selected by McKee. Pursuant to its right under the forum-selection clause, McKee designated the United States District Court for the Northern District of Illinois as the single forum to resolve these disputes.

Two of the judges (Hon. Thomas R. McMillen of the Northern District of Illinois and Hon. Herbert P. Sorg of the Western District of Pennsylvania) have ruled that, under this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the forum-selection clause is valid and reasonable and, further, that McKee's choice of the Illinois court is reasonable. Therefore, those judges have required G.C.S. to litigate its contract claims against McKee in the Illinois court. However, the third judge (Respondent Hon. Daniel J. Snyder, Jr. of the Western District of Pennsylvania) ruled in the instant case that since the contract claims in the lawsuit before him were asserted in a third-party complaint by G.C.S. against McKee, neither

* G.C.S. is a wholly-owned subsidiary of respondent I.S.C., Inc. Throughout this petition, we denominate I.S.C. and G.C.S. together as "G.C.S." since they have made identical claims below as to all matters relevant to the petition.

the *Bremen* decision nor the decisions of Judges McMillen and Sorg required him to give effect to the agreement of the parties.

As a result, a complex contract dispute is proceeding in two courts simultaneously and, inevitably, will require protracted appeals in two circuits to determine the effect substantive decisions in each case have upon the other one. Moreover, as matters now stand each case will be tried to a jury, increasing the likelihood of inconsistent judgments, and further confusing the appeals.*

The Parties and the Litigation

In 1973, the United States Steel Corporation contracted with McKee's Chicago-based Food and Pharmaceutical Division for the construction of a pollution control facility at Clairton, Pennsylvania. In January, 1974, McKee verbally awarded a lump sum subcontract for the bulk of the piping work on the project to respondent G.C.S., Inc.

The McKee-G.C.S. subcontract was negotiated in Chicago and was formally executed there by the parties during April, 1974. As part of the subcontract, G.C.S. accepted from McKee a purchase order for valves to be used on the U.S. Steel project which one week earlier McKee had placed with respondent McJunkin Corporation's suburban-Chicago branch office. The subcontract specifically recited that G.C.S. would be responsible for ordering any additional valves required on the project which were not included on the purchase order. Subsequently, G.C.S. placed its own confirming purchase orders with McJunkin and other suppliers for most of the valves on McKee's

* Even if one party loses both trials, it will have to appeal from both judgments—in different judicial circuits—in order to preserve its rights in all the lawsuits. *Reed* v. *Allen*, 286 U.S. 191, 198-99 (1932).

initial purchase order and for pipe and fittings as well as other valves needed for the project.

Numerous disputes developed between McKee and G.C.S. over their responsibilities under the subcontract and the quality of their respective work during 1974 and 1975. In early 1975, McKee began withholding some of its monthly payments to G.C.S., and G.C.S. in turn began withholding some payments to its suppliers, including McJunkin. In March, 1975, McJunkin sued G.C.S. in the United States District Court for the Western District of Pennsylvania (the "*McJunkin case*") for the balance due on G.C.S.'s account, invoking the district court's diversity jurisdiction under 28 U.S.C. §1332. McJunkin's complaint, which was assigned to Judge Snyder, made no claims against McKee.

Matters between McKee and G.C.S. came to a head during May, 1975. On May 16, 1975, McKee and G.C.S. sued each other for breach of contract and negligence in the United States District Court for the Northern District of Illinois (the "*McKee case*"), and in the United States District Court for the Western District of Pennsylvania (the "*G.C.S. case*"), respectively. The *McKee case* was assigned to Judge McMillen and the *G.C.S. case* was assigned to Judge Sorg. Both cases invoked the courts' diversity jurisdiction under 28 U.S.C. §1332.

Thus, as of May 16, 1975, three different lawsuits arising out of the same construction project were pending before three different federal judges.

The Forum-Selection Clause

The forum-selection clause in the McKee-G.C.S. subcontract expressly provides that all disputes arising out of the Clairton project which involve McKee and G.C.S. are to

be resolved before one forum selected by McKee. The clause gives McKee the right to choose either an arbitration panel or a court as the forum and, to that end, provides that G.C.S. will consent to the stay of any proceedings between McKee and G.C.S. involving the Clairton project which are pending before other forums:

> "36. DISPUTES: It is the general intention of the parties that *any dispute relating to this Subcontract or the Prime Contract or involving a matter or question of law or fact common to them or the parties thereto shall be settled, to the extent feasible, before a single forum selected by Contractor*, and a decision by such forum with respect to any such question or matter shall be binding on Subcontractor, provided that it has a reasonable opportunity to be represented and heard. To this end:
>
> "(a) [Gives McKee the right to require arbitration.]
>
> "(b) If Contractor shall not elect arbitration, or *if in the opinion of Contractor any dispute involves either a matter or question of law or fact common to the Subcontract and the Prime Contract or involves third parties the dispute shall at the option of the Contractor be submitted to the forum which in Contractor's reasonable opinion can best determine and settle most aspects of such dispute* and the decision of that forum shall be binding on the parties, provided that they have been given notice and the opportunity for adequate representation.
>
> "(c) *In the event of any proceeding pursuant to this provision, the parties shall take action to see that proceedings before any other forum shall be stayed pending completion of such proceeding* and the decision of the forum with respect to such proceeding pursuant to this

provision shall be binding upon the parties and supersede any contrary decision of any other arbitrators or forum to the extent equitable.

"(d) Subcontractor hereby consents to such service and to submit itself to such jurisdiction as is necessary to effect the purposes of this Clause 36, and further *hereby agrees to and consents to such stays and other actions necessary to effect the purposes hereof.*" (App. 6-7; emphasis added).

McKee filed a motion before Judge Sorg to stay the *G.C.S. case* under the forum-selection clause or to transfer the *G.C.S. case* to the Illinois court under 28 U.S.C. §1404 (a). G.C.S. then filed a motion before Judge McMillen to transfer the *McKee case* to the Pennsylvania court under 28 U.S.C. §1404(a). Shortly thereafter, McKee agreed to let Judge McMillen determine the validity and enforceability of the clause and whether the Illinois court was a reasonable forum in which to litigate the McKee-G.C.S. contract dispute. Therefore, McKee withdrew its motion to stay or transfer the *G.C.S. case* and filed an answer preserving its rights under the forum-selection clause in the McKee-G.C.S. subcontract, and argued as an additional defense that the claims asserted in G.C.S.'s complaint should be asserted as counterclaims in the *McKee case* under F.R.Civ.P. 13(a).

In its motion before Judge McMillen, G.C.S. argued that the convenience of the parties and witnesses and the pendency of the *McJunkin case* in addition to the *G.C.S. case* in the Pennsylvania court mandated transfer of the *McKee case* to Pennsylvania so all three related cases could be heard together. To underscore its point, G.C.S. filed a third-party complaint against McKee in the *McJunkin case*

on June 16, 1975, one month after the *McKee case* and *G.C.S. case* had been filed. That third-party complaint is the subject of this petition. Following the procedure adopted in the *G.C.S. case,* McKee answered the third-party complaint, reserving its defenses under the forum-selection clause.

The Conflicting Decisions

On November 7, 1975, Judge McMillen denied G.C.S.'s motion to transfer the *McKee case* to the Pennsylvania court, specifically holding that the parties' forum-selection clause was valid and enforceable under the circumstances. (App. 19). Judge McMillen ruled that, under this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1 (1972), McKee possessed the right to consolidate its contract disputes with G.C.S. in the Illinois court. Judge McMillen noted that the whole *McJunkin case* "apparently" could not be transferred to the Northern District of Illinois, but he concluded that the pendency of another related lawsuit in Pennsylvania against G.C.S. was no reason to depart from the *Bremen* rule as it applied to the contractual agreement between McKee and G.C.S. (App. 17, 19). Judge McMillen also stated that the convenience of the parties and witnesses as well as the interests of justice favored trial of the disputes in Illinois. (App. 25). To avoid any prejudice to the parties, Judge McMillen indicated that, since McJunkin is located in the Northern District of Illinois, he is willing to permit McJunkin to be joined in the Illinois litigation, and that he will not require G.C.S. to relitigate in Illinois any matters determined between McJunkin and G.C.S. in Pennsylvania. (App. 19).

Thereafter, McKee renewed its motion to stay the *G.C.S. case* or to transfer it to Illinois, and moved in the *McJunkin*

case to sever and transfer G.C.S.'s third-party complaint against McKee to Illinois. McJunkin consented to the latter motion, but G.C.S. opposed each one.

On March 19, 1976, Judge Sorg concurred in Judge McMillen's decision and transferred the *G.C.S. case* to Illinois. (App. 25). However, on March 22, 1976, Judge Snyder refused to follow the decisions of Judges McMillen and Sorg.*

Judge Snyder based his refusal to enforce the clause on the proposition that forum-selection clauses cannot be enforced in third-party actions because an agreement between a third-party plaintiff and third-party defendant cannot be construed to affect the initial plaintiff's rights. (App. 8). He did not indicate how staying or transferring G.C.S.'s third-party action against McKee would affect McJunkin's rights. In addition, Judge Snyder held that the claims asserted in G.C.S.'s third-party complaint were not compulsory counterclaims in the *McKee case* under F.R.Civ.P. 13(a) since they will not be "mature" until a judgment is entered in the main part of the *McJunkin case.* (App. 9).**

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* Although not presented in this petition as a separate reason for granting the writ, McKee argued in the Third Circuit as part of its petition for a writ of mandamus that Judge Snyder's orders represented a substantial abuse of discretion since they amounted to a reversal of the rulings of Judges McMillen and Sorg. *See, e.g., Ellicott Mach. Corp.* v. *Modern Welding Co.,* 502 F.2d 178, 181 (4th Cir. 1974); *Gulf Research & Dev. Co.* v. *Schlumberger Well Surveying Corp.,* 98 F. Supp. 198, 200-01 (D. Del.), *petition for writ of mandamus denied,* 193 F.2d 302 (3d Cir. 1951).

** McKee does not agree with Judge Snyder's conclusion that G.C.S.'s third-party claims against McKee are not mature, especially since G.C.S. had previously raised the same claims in its complaint

(Footnote continued)

McKee moved for Judge Snyder to reconsider his ruling in view of the facts that (1) the initial plaintiff, McJunkin, consented to a severance and transfer of the third-party action, and (2) practically, it would be difficult if not impossible to prevent G.C.S. from asserting in the *McJunkin* third-party action its claims in the *G.C.S. case* which Judge Sorg had ordered must be litigated in Illinois.* However, on June 18, 1976, Judge Synder confirmed his prior decision, refusing to sever and transfer or to stay G.C.S.'s third-party complaint.

Within one week after Judge Snyder's second decision, G.C.S. filed its pretrial statement in the instant case, ex-

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(Footnote continued)

in the *G.S.C. case* where they remain pending. As this Court stated in *Southern Constr. Co.* v. *Pickard,* 371 U.S. 57, 60 (1962), Rule 13(a) "was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint." This is precisely what G.C.S. has done below.

However, even if Judge Snyder were correct on this point, it should be noted that (1) the forum-selection clause is not limited by its terms to "mature" claims, and (2) under F.R.Civ.P. 13(e), G.C.S. can assert after-acquired claims in the Illinois litigation.

* In fact, G.C.S. later impleaded McKee in yet another lawsuit arising out of the McKee-G.C.S. subcontract. G.C.S. assigned part of its responsibilities under the subcontract to Honeywell, Inc. On July 30, 1975, Honeywell sued G.C.S. in the Court of Common Pleas of Allegheny County, Pennsylvania for breach of the Honeywell-G.C.S. argeement, and, on September 10, 1975, G.C.S. filed a third-party complaint against McKee. McKee moved to sever and dismiss or stay that third-party action but the state court, citing Judge's Snyder's ruling, denied McKee's motion. (App. 27-28). Thus, if Judge Snyder's decision is permitted to stand, the McKee-G.C.S. dispute will actually be litigated before *three* courts, with no possibility of consolidating the cases on appeal.

pressly raising in the *McJunkin case* for the first time many of the claims it had asserted in its complaint in the *G.C.S. case* which Judge Sorg had transferred to the Illinois court. McKee immediately moved to strike G.C.S.'s pretrial statement and for Judge Snyder to reconsider his refusal to stay the third-party action as provided in the parties' forum selection clause. McKee pointed out that Judge Sorg had already held that clause valid and binding with respect to the claims asserted in the *G.C.S. case,* and that to permit G.C.S. to re-assert those same claims in the instant case was tantamount to reversing Judge Sorg's order. Judge Snyder took McKee's motion under consideration, but on July 21, 1976, he denied the motion without opinion. (App. 15-16).

On August 11, 1976, McKee filed a notice of appeal from Judge Snyder's July 21, 1976 order and, on August 17, 1976, McKee filed a petition for a writ of mandamus directing Judge Snyder to vacate his July 21, 1976 order. On August 18, 1976, the United States Court of Appeals for the Third Circuit consolidated McKee's appeal and mandamus petition, directed respondents G.C.S. and McJunkin to answer McKee's petition, and established an expedited briefing schedule in the appeal. However, after hearing oral argument in the cases on October 5, 1976, the Third Circuit dismissed both the appeal and the petition on October 28, 1976, without opinion. (App. 1-2).

REASONS FOR GRANTING THE WRIT

A. JUDGE SNYDER'S DECISIONS ARE IN DIRECT CONFLICT WITH A CONTROLLING DECISION OF THIS COURT.

Judge Snyder and, implicitly, the Third Circuit have held that a valid and binding forum-selection clause cannot be enforced by a third-party defendant against a third-party plaintiff despite unambiguous language in the clause which expressly contemplates and provides for such enforcement. That decision is in direct conflict with this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

Bremen involved a towage contract between American and German corporations. The contract contained a forum-selection clause which provided that any disputes arising out of the parties' contractual relationship must be litigated in London, England. Despite the English courts' rulings that the clause was valid and reasonable, the American court refused to enforce the clause and enjoined the parties from proceeding in England. This Court vacated the injunction and stated that a "forum clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. Such a showing requires "the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." 407 U.S. at 18.*

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* Although *Bremen* was decided in the context of an international transaction, lower courts have uniformly interpreted the policies announced in *Bremen* as applying to domestic disputes. *Fireman's Fund Amer. Ins. Cos.* v. *Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1296-97 (1st Cir. 1974); *Solomon* v. *Solomon*, 516 F.2d 1018, 1019-20 n.1 (3d Cir. 1975); *In-Flight Devices Corp.* v. *Van Dusen Air, Inc.*, 466 F.2d 220, 234 n.24 (6th Cir. 1972); *National Equip. Leasing Corp.* v. *Farrier*, 486 F.2d 258, 261 n.2 (10th Cir. 1973).

Here, there is no question that G.C.S. will have its day in court on the claims raised in the third-party complaint since G.C.S. had previously raised all of these claims, and several others, in its complaint in the *G.C.S. case* now pending in Illinois. In fact, the forum-selection clause specifically lists disputes "involv[ing] third parties" among those proceedings which G.C.S. agrees to stay pending resolution of the main McKee-G.C.S. action. Since the clause was held valid and reasonable by Judges McMillen and Sorg, there are no grounds, under *Bremen*, for permitting G.C.S. to avoid its contractual obligations.

Judge Snyder nevertheless held that the *Bremen* rule is not applicable to third-party actions where the initial plaintiff's claim does not rely on the agreement which contains the forum-selection clause. He reasoned that since the plaintiff cannot be compelled to accept someone else's choice of forum under the clause, the defendant/third-party plaintiff must be given the opportunity to fully defend himself against the plaintiff's claim by impleading third-parties under F.R.Civ.P. 14(a), despite the express provisions of a forum-selection clause intended to prevent duplicative litigation between the parties. Therefore, Judge Snyder ruled that he will permit G.C.S. to litigate "one small portion" of the McKee-G.C.S. contract dispute in his court.* (App. 13).

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* Judge Snyder made this statement in his order of June 18, 1976, which denied McKee's motion for reconsideration of his earlier order. It subsequently became clear that much more than "one small portion" of the McKee-G.C.S. contract dispute was involved in the third-party action. When G.C.S. filed its pretrial narrative statement on June 24, 1976, it expressly raised claims relating to McKee's performance on the project, which were first raised in the *G.C.S. case* and ultimately transferred to Illinois by Judge Sorg. Those claims involve all aspects of the contract dispute.

Bremen does not mandate applying a rigid rule that would require enforcement of forum-selection clauses in all situations. But, as Judge McMillen correctly held, the fact that a third-party has sued G.C.S. in the Western District of Pennsylvania is no reason to depart from the *Bremen* rule. *Tai Kien Indus. Co.* v. *M/V Hamburg*, 528 F.2d 835, 836 (9th Cir. 1976). Nor does the mere availability to G.C.S. of a Rule 14 impleader permit a court to ignore parties' clear contractual agreements. *E.g., Iron Mines Co. of Venezuela* v. *SS Cosmic*, 268 F. Supp. 749, 751 (S.D.N.Y. 1966); *Peter Pan Fabrics, Inc.* v. *Kay Windsor Frocks, Inc.*, 187 F. Supp. 763, 764 (S.D.N.Y. 1959) (arbitration cases).* This is particularly true where, as here, the initial plaintiff (McJunkin) has consented to the severance and stay, transfer, or separate trial of the third-party action, and where the defendant/third-party plaintiff contractually is obligated to so consent.

It was entirely foreseeable in a large construction project that G.C.S. might become involved in litigation with its suppliers and subcontractors. As Judge McMillen noted, in view of the number and different locations of subcontractors, suppliers, and employees involved with the Clairton project, McKee had a "valid reason for attempting to centralize its disputes in a single forum" when negotiating and subcontracting the work. (App. 19). For that reason, the clause expressly covered actions "involving third parties." G.C.S. agreed to be bound by the terms of the

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* Similarly, in *Bremen*, this Court rejected the argument that the availability of an *in rem* limitation of liability procedure was sufficient to warrant ignoring the parties' forum-selection agreement, stating that "the language of the clause is clearly mandatory and all-encompassing." 407 U.S. at 20. As noted above, the forum-selection clause in the McKee-G.C.S. subcontract clearly encompasses third-party action (see p. 7 *supra*).

clause—which expressly covered such situations—and received consideration for that promise. *Central Contracting Co.* v. *Maryland Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966).

In accordance with the policy of reducing uncertainties of commercial litigation which this Court approved in *Bremen*, 407 U.S. at 13-14, the forum-selection clause serves to eliminate the uncertainty and expense of duplicative and expensive litigation in different forums. Particularly in a situation like that presented in this petition—where permitting an impleader increases the number of forums in which a lawsuit is proceeding and so negates the policies Rule 13 and 14 were intended to promote—Judge Snyder's order is directly contrary to the rule and policy established by this Court in *Bremen*.

B. JUDGE SNYDER'S REFUSAL TO STAY THE THIRD-PARTY ACTION AS REQUIRED BY THE FORUM-SELECTION CLAUSE IS IMMEDIATELY APPEALABLE BY McKEE AS OF RIGHT.

In addition to denying McKee relief by mandamus against Judge Snyder's refusal to follow the *Bremen* rule in the proceeding below, the Third Circuit also dismissed McKee's appeal from Judge Snyder's July 21, 1976 Order refusing to stay the third-party action. Under this Court's decisions in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), and *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U.S. 449 (1935), the court of appeals had jurisdiction of McKee's appeal pursuant to both 28 U.S.C. §1291 and 28 U.S.C. §1292(a)(1).

Jurisdiction under 28 U.S.C. §1291

Cohen involved a derivative action brought by a shareholder against a corporation's officers and directors for

alleged fraud and waste of corporate assets. The corporation's by-laws obligated it to indemnify the officers and directors for the cost of a successful defense. Pursuant to a state statute, the corporation moved to require the shareholder to post security for costs. After the district court denied the motion, this Court reversed and noted that the lower court's refusal to enforce the state statute was appealable as a "final decision" under 28 U.S.C. §1291:

> "[T]his order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. *When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.* We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case." 337 U.S. at 546. (Emphasis added).

The *Cohen* decision was recently reaffirmed by this Court in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Eisen* involved an appeal from a district court order certifying a class under F.R.Civ.P. 23(c)(2) and imposing most of the costs of notice to the class upon the defendants. Citing *Cohen*, this Court held the order appealable pursuant to 28 U.S.C. §1291 because the order "concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment." The Court set forth two requirements for review under the *Cohen* doctrine: (1) the order appealed from must not be "tentative, informal or incomplete," but rather must conclusively determine a claim of right, and (2) the order must not constitute "merely a step toward final disposition of the merits of the case." 417 U.S. at 171.

This is precisely the situation below. Judge Snyder has conclusively ruled that McKee is not entitled to the benefits of a contractual agreement to litigate all disputes arising out of the McKee-G.C.S. subcontract in the Illinois court. McKee's rights under the forum-selection clause are not an element of McKee's defense to the substantive claims in G.C.S.'s third-party complaint, and Judge Snyder's order refusing to enforce the clause will not merge in a final judgment on the third-party action. Furthermore, as this Court stated in *Cohen,* 28 U.S.C. §1291 must be given a "practical rather than a technical construction." 337 U.S. at 546. Practically, the damage which the clause seeks to prevent—the expense and risk of inconsistent results inherent in multiple trials of identical claims—will already have occurred if review is postponed until a final judgment is entered in the *McJunkin case.*

Jurisdiction under 28 U.S.C. §1292(a)(1)

Shanferoke Coal involved a coal supply contract which provided that any disputes arising out of the contract would be arbitrated. However, after a dispute developed, one party violated this agreement and filed a contract action. When the trial court refused to stay the lawsuit pending arbitration, this Court ruled that the refusal was appealable under the predecessor to 28 U.S.C. §1292(a)(1).* The Court noted that, under *Enelow* v. *New York*

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* Although decided under the predecessor to 28 U.S.C. §1292(a)(1), *Shanferoke Coal* has been applied uniformly under §1292(a)(1): *Blake Constr. Co.* v. *International Laborers' Union,* 511 F.2d 324, 326 (D.C. Cir. 1975); *Warren Bros. Co.* v. *Cardi Corp.,* 471 F.2d 1304, 1306 (1st Cir. 1973); *Standard Chlorine of Del., Inc.* v. *Leonard,* 384 F.2d 304, 308 (2d Cir. 1967); *Jackson Brewing Co.* v. *Clarke,* 303 F.2d 844, 845 (5th Cir. 1962); *Danford* v. *Schwabacher,* 488 F.2d 454, 455 (9th Cir. 1973).

Life Ins. Co., 293 U.S. 379, 381-83 (1935), the denial of an equitable or special defense to an action at law was appealable as the denial of an interlocutory injunction. In *Shanferoke Coal,* this Court concluded that a contractual right to a stay was such an equitable or special defense. 293 U.S. at 452.

At a minimum, the forum-selection clause in the McKee-G.C.S. subcontract entitles McKee to a stay of the third-party action in the *McJunkin case.* Since the third-party complaint only seeks money damages for alleged breaches of the McKee-G.C.S. subcontract, the third-party action is unquestionably an action at law. Therefore, under *Shanferoke Coal,* Judge Snyder's refusal to grant McKee a stay of the third-party action is appealable as of right under 28 U.S.C. §1292(a)(1), and the Third Circuit erred in dismissing McKee's appeal.

CONCLUSION

In *The Bremen* v. *Zapata Off-Shore Co.,* 407 U.S. 1, 18 (1972), this Court held that reasonable and fairly negotiated forum-selection clauses must be enforced absent a showing by "the party seeking to escape his contract . . . that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." The decision below—authorizing the resisting party to avoid its contractual obligation merely because enforcement is requested in a third-party context—does violence to both the holding of *Bremen* and the rationale behind it. Here, the clause applies by its terms to disputes "involv[ing] third parties," the third-party (McJunkin) has consented to McKee's request for enforcement, and two district courts have upheld and enforced the clause against the single resisting party.

As a result of the decision below, McKee has been unjustly deprived of the benefit of its bargain, and the parties, witnesses and courts will be burdened by two trials of the same issues. Neither principles of freedom of contract, nor principles of comity and judicial economy, nor the interests of justice, nor this Court's decision in *Bremen* support such a result.

For all the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: January 17, 1977

APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 76-2064 and 76-2065

ARTHUR G. McKEE & COMPANY,

Petitioner in No. 76-2064

v.

G.C.S., INC., I.S.C., INC., AND McJUNKIN CORP.,

Respondents,

and

HONORABLE DANIEL J. SNYDER, JR., United States District Judge for the Western District of Pennsylvania,

Nominal Respondent.

On Petition for Writ of Mandamus

McJUNKIN CORPORATION,

Plaintiff,

v.

G.C.S., INC., AND I.S.C., INC.,

Defts. and 3d-party plaintiffs in D.C.

v.

ARTHUR G. McKEE & COMPANY,

3d party defendant in D.C.

(D.C. Civil Action No. 75-351)

On Appeal from the United States District Court for the Western District of Pennsylvania

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Argued October 5, 1976

Before: FORMAN, ADAMS and WEIS, *Circuit Judges*

JUDGMENT ORDER

After considering all the contentions raised by the appellant-petitioner, it is

ADJUDGED AND ORDERED that the appeal and the petition for a writ of mandamus are hereby dismissed.

Each side to bear its own costs.

BY THE COURT,

/s/ *A. M. Adams*
Circuit Judge

ATTEST:

/s/ *Thomas F. Quinn*
Thomas F. Quinn
Clerk

DATED: Oct. 28, 1976

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

McJUNKIN CORPORATION,
Plaintiff,

vs.

G.C.S., INC., and I.S.C., INC.,
Defendants and Third-Party Plaintiffs,

vs.

ARTHUR G. McKEE & COMPANY,
Third-Party Defendant.

Civil Action No. 75-351

OPINION AND ORDER

SNYDER, J.

In this diversity contract action, McJunkin Corporation has sued G.C.S., Inc. and its guarantor, I.S.C., Inc., for merchandise sold to G.C.S. The Defendants brought a third-party action against Arthur G. McKee & Company, alleging that McKee entered into a valve purchase order with McJunkin and this purchase order was later assigned to G.C.S. by McKee, on condition that McKee assure G.C.S. that McJunkin would accept the return by G.C.S. of any unsuitable or excess merchandise ordered from McJunkin by McKee as well as similar items subsequently ordered by G.C.S. directly from McJunkin. When G.C.S. attempted to make returns, McJunkin allegedly accepted only one

of four tendered truckloads of excess material and McKee also refused the returns.

McKee, the prime contractor on a construction contract for the United States Steel Corporation, brought suit on May 16, 1975 in the United States District Court for the Northern District of Illinois (*Arthur G. McKee & Company* v. *G.C.S., Inc.*, No. 75 C 1578), alleging that G.C.S. as its piping subcontractor had materially breached the subcontract in several major aspects,[1] resulting in McKee being required to spend an additional $328,000.00 to complete its contract. On the same day, G.C.S. instituted suit against McKee in the United States District Court for the Western District of Pennsylvania (*G.C.S., Inc.* v. *Arthur G. McKee & Company,* No. C.A. 75-604) (the first Pittsburgh case), alleging that McKee breached the subcontract by failing to permit G.C.S. to perform the subcontract in an orderly manner and by negligently performing its duties as the prime contractor; and seeking $1,950,000.00 in damages.

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[1] Specifically, the Illinois action complained of the following:

"a. failing to construct the utility stations according to the specifications of the subcontract and supplements thereto;

b. constructing only one of the three required eye wash stations;

c. failing to steam trace the piping for freeze protection;

d. performing its painting tasks in an unworkmanlike manner and in violation of the specifications;

e. failing to perform adequate engineering work for pipe supports and hangers;

f. failing to properly connect pipes to pumps and equipment; and

g. failing to conform to the overall job requirement schedules and failing to complete all work required under the subcontract by December 31, 1974."

G.C.S. moved to transfer the Illinois action to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404 (a).[2] At the same time in the first Pittsburgh action, McKee moved for a "Stay or Other Relief", contending that a forum selection clause in the McKee-G.C.S. subcontract limited the action to a forum selected by McKee.

On November 7, 1975, Judge McMillen held in the Illinois case that the forum selection clause was enforceable under the standards set forth in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), and denied the §1404(a) Motion for Transfer. In light of Judge McMillen's ruling, McKee pressed its Motion for Stay or Other Relief in the first Pittsburgh case, and this Motion was granted, and the case was sent to Illinois.

Prior thereto, the Defendants in this action (the second Pittsburgh case) moved for an Order permitting the joining of McKee as a third-party defendant, which Motion was granted by the Court. The third-party complaint alleged that before G.C.S. was chosen to be the piping subcontractor on the McKee contract with United States Steel, McKee had entered into the valve purchase order with McJunkin which is the subject of this proceeding, and that McKee's purchase order was later assigned to G.C.S. under the conditions previously noted.

After Judge McMillen's ruling in the Illinois case, McKee moved in this Court to sever and transfer the third-party action and in support thereof argued:

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[2] 28 U.S.C. §1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

1. The forum selection clause in the McKee-G.C.S. subcontract would require the transfer of the third-party action since the contractor has chosen Illinois as the single forum for the resolution of disputes under the subcontract.

2. The third-party action in this suit is a Rule 13(a) compulsory counterclaim to the Illinois action.

3. Rule 14(a) of the Federal Rules of Civil Procedure dictates a severance of the third-party action in order to simplify the issues as between McKee and G.C.S., who are involved in litigation there.

Defendants G.C.S. and I.S.C. have objected to the severance and transfer.

THE FORUM SELECTION CLAUSE

Paragraph 36 of the General Terms and Conditions of the G.C.S. subcontract (the forum selection clause) provides:

> "DISPUTES: It is the general intention of the parties that any dispute relating to this Subcontract or the Prime Contract or involving a matter or question of law or fact common to them or the parties thereto shall be settled, to the extent feasible, before a single forum selected by the Contractor, and a decision by such forum with respect to any such question or matter shall be binding on Subcontractor, provided that it has a reasonable opportunity to be represented and heard. To this end:
>
> • • •
>
> (b) If Contractor shall not elect arbitration, or if in the opinion of Contractor any dispute involves

> either a matter of question of law or fact common to the Subcontract and the Prime Contract or involves third parties the dispute shall at the option of the Contractor be submitted to the forum which in Contractor's reasonable opinion can best determine and settle most aspects of such dispute and the decision of that forum shall be binding on the parties, provided that they have been given notice and the opportunity for adequate representation.
>
> (c) In the event of any proceeding pursuant to this provision, the parties shall take action to see that proceedings before any other forum shall be stayed pending completion of such proceeding and the decision of the forum with respect to such proceeding pursuant to this provision shall be binding upon the parties and supersede any contrary decision of any other arbitrators or forum to the extent equitable.
>
> (d) Subcontractor hereby consents to such service and to submit itself to such jurisdiction as is necessary to effect the purposes of this Clause 36, and further hereby agrees to and consents to such stays and other actions necessary to effect the purposes hereof."

It is undisputed that McKee, pursuant to its contractual rights under the forum selection clause, selected the United States District Court for the Northern District of Illinois. As noted, Judge McMillen held in that action that the agreement was enforceable and stated [App. 19]:

> ". . . The plaintiff as an international construction firm has a valid reason for attempting o centralize its

disputes in a single forum, and there is no evidence that this clause was negotiated unfairly or by means of undue influence or unequal bargaining power. . . ."

We agree entirely with Judge McMillen's conclusions under the authority of *M/S Bremen, supra. See also,* the opinion of this Court in *Spatz* v. *Nascone,* 364 F.Supp. 967 (W.D. Pa. 1973).

The issue before Judge McMillen, however, was the enforceability of the forum selection clause in the context of a claim against G.C.S. by McKee, and not the construction of the clause in the context of a third-party action. In our case there exists no dispute as such between McKee and G.C.S., except as a derivative[3] action by G.C.S. against McKee based solely on the McJunkin claim. The forum selection clause, by its terms, simply does not apply to the claims being asserted here.

Nor do the ends of orderly judicial administration, consolidation of disputes involving related transactions, or any other arguments by the third-party defendant dictate, to our way of thinking, any different results. Paragraph 36 is clear that the intention of the parties was that any dispute involving a matter of law or fact should be settled to the extent feasible before a forum selected by the contractor—McKee. The Complaint in the instant proceeding involves a purchase order made even prior to the execution of the subcontract and involving a claim by a person not a party thereto. Thus there is no reason for calling the forum selection clause into operation, and no mandate

[3] *See Southeast Mortgage Company* v. *Mullins,* 514 F.2d 747 (5th Cir. 1975); *United States* v. *Joe Grasso & Son, Inc.,* 380 F.2d 749 (5th Cir. 1967); *National Fire Ins. Co. of Hartford* v. *Daniel J. Keating Co.,* 35 F.R.D. 137 (W.D. Pa. 1964).

exists for transfer of the third-party action to the Northern District of Illinois pursuant to 28 U.S.C. §1404(a).

COMPULSORY COUNTERCLAIM

As we have noted, McKee contends that the third-party complaint must be severed inasmuch as the claim has become a compulsory counterclaim in the Illinois action, as provided by Rule 13(a), Fed.R.Civ.P. Rule 13(a) provides that the claim must be mature "at the time of serving the pleading". The courts have consistently held that where a claim is dependent on the outcome of other litigation it is not mature but only contingent. *Stahl* v. *Ohio River Company,* 424 F.2d 52 (3d Cir. 1970); *Chicago Freight Car Leasing Co.* v. *Martin Marietta Corp.,* 66 F.R.D. 400 (N.D. Ill. 1975); *Cyclotherm Corporation* v. *Miller,* 11 F.R.D. 88 (W.D. Pa. 1950).

G.C.S.'s claim against McKee, arising out of the purchase order assignment, depends entirely upon the outcome of the McJunkin versus G.C.S. claim. It is thus dependent upon the resolution of a "primary matter" and is therefore not mature. *Chapin & Chapin, Inc.* v. *McShane Contracting Co., Inc.,* 374 F.Supp. 1191 (W.D. Pa. 1974). The contention is without merit.

SEVERANCE OF THIRD-PARTY CLAIM

McKee finally asks for a Rule 14(a) discretionary severance, alleging that prejudice or confusion would otherwise result. *See* 3 *Moore's Federal Practice* ¶14.01[8] at p. 14-46 (2d ed. 1974). It is the opinion of this Court that retention of this third-party claim within the confines of this purchase order suit will isolate the supplier, contractor and subcontractor, and will prove for the expeditious resolution of this distinct problem between the parties. It

will not, as McKee suggests, cause confusion. The main suit between McKee and G.C.S. is large and complex, involving numerous claims and counterclaims arising out of a multi-million dollar construction contract. McJunkin's claim against G.C.S. and I.S.C. could become lost in this much larger action. We thus decline to exercise discretion by ordering a severance and transfer as provided in Rule 14(a), Fed.R.Civ.P.

An appropriate Order will be entered.

ORDER OF COURT

AND NOW, to-wit, this 22nd day of March, 1976, after due consideration of and argument on the Motion of the Third-Party Defendant Arthur G. McKee & Company, to Sever and Transfer, and for the reasons as set forth in the accompanying Opinion of the Court,

IT IS ORDERED that the Motion be and the same is hereby denied.

/s/ *Daniel J. Snyder, Jr.*
United States District Judge

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

McJunkin Corporation, a corporation,
Plaintiff,

vs.

G.C.S., Inc., a corporation, and
I.S.C., Inc., a corporation,
Defendants
and Third-Party Plaintiffs,

vs.

Arthur G. McKee & Company, a corporation,
Third-Party Defendant.

Civil Action No. 75-351

OPINION

SNYDER, J.

The Third Party Defendant, Arthur G. McKee & Company (McKee), moved this Court to reconsider its Order of March 22, 1976, denying McKee's Motion to transfer this subcontract action to the Illinois Court having jurisdiction of the *McKee* v. *G.C.S., Inc.* main contract proceedings,[1]

[1] G.C.S. moved for transfer of the Illinois action to the Western District of Pennsylvania, which motion was denied by Judge McMillen on the basis that the Forum Selection Clause of the Contract was enforceable. G.C.S. had entered suit against McKee in the Western District of Pennsylvania (C.A. 75-604) and Chief Judge Sorg transferred that case to Illinois.

and McKee filed an Amended Motion to Bifurcate and Stay the Third-Party Action brought it by G.C.S., Inc. and I.S.C., Inc. In the alternative, McKee moved for entry of an Order transferring the entire proceedings to the Illinois Court pursuant to 28 U.S.C. §1404(a).[2]

This Court concluded in its previous Order that:

1) G.C.S.'s Third-Party Complaint did not arise out of the McKee-G.C.S. contract, and, therefore, that the Forum Selection Clause contained in the McKee-G.C.S. contract did not apply to the Third-Party Complaint.

(2) The claims in G.C.S.'s Third-Party Complaint were wholly contingent upon the outcome of McJunkin's Complaint, and, therefore, were neither compulsory counterclaims in the contract action brought by McKee against G.C.S. in Illinois, nor claims which were encompassed in the contract action brought by G.C.S. against McKee in this district.

(3) The issues raised in the Third-Party action were "distinct" from those now being litigated in the parties' contract actions in Illinois and, therefore, did not require a discretionary severance and transfer pursuant to Federal Rule of Civil Procedure 14(a).

McKee again contends that the claims raised in the Third-Party Complaint are identical to many of those now being litigated in Illinois. As we noted in our Opinion and Order of March 22, 1976, the issue before Judge McMillen was the enforceability of the Forum Selection Clause

[2] 28 U.S.C. §1404(a) provides:
"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

in the context of the claims against G.C.S. by McKee, and not the construction of that Clause in the context of a third-party action. We concluded then, as we conclude now, that the dispute in the instant proceeding is not the dispute between McKee and G.C.S., except as derivative from the McJunkin claim for the price of pipe.

Nor are we impressed with the argument by McKee that the retention of the Third-Party Complaint threatens to bury the McJunkin purchase order claim among unrelated issues. To the contrary, as we held previously, the main suit between McKee and G.C.S. involved numerous claims and counterclaims arising out of a multi-million dollar construction contract. The McJunkin claim for the price of pipe is only one small portion of that contract, and in that regard it is especially noted that the instant proceeding involved the purchase order made even prior to the execution of the contract, which included the Forum Selection Clause. In considering all of the arguments made by McKee, it is still the judgment of this Court that the Motion for Severance of the Third-Party Complaint and the Amended Motion to Bifurcate and Stay the Third-Party Action must be denied.

The Alternative Motion to Transfer Entire Case to Illinois again raises the contention that the Third-Party Complaint of G.C.S. involves the same contract action now pending in Illinois, that this Court was therefore wrong in concluding G.C.S.'s claim against McKee in the instant proceeding depended entirely on the outcome of the McJunkin v. G.C.S. claim and was thus dependent on the resolution of the primary matter, citing *Chapin & Chapin v. McShane Contracting Co., Inc.* 374 F.Supp. 1191 (W.D. Pa. 1974). McKee's Motion does not meet this issue, but simply argues that the Illinois action involves G.C.S. and

McKee and, therefore, the entire matter should be transferred. Our previous Order points out the error of this argument, and the Alternative Motion will be denied.

An appropriate Order will be entered.

ORDER

AND NOW, to-wit, this 18th day of June, 1976, after due consideration of and argument on the Motions of the Third-Party Defendant, Arthur G. McKee & Company, and for the reasons set forth in the Opinion being filed simultaneously herewith,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Reconsideration of Third-Party Defendant Arthur G. McKee's Motion To Sever and Transfer The Third-Party Complaint of G.C.S., Inc., the Alternative Motion To Transfer The Entire Case To Illinois, and the Amended Motion To Bifurcate And Stay The Third-Party Action be and the same are hereby denied.

/s/ *Daniel J. Snyder, Jr.*

United States District Judge

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

McJunkin Corporation,

Plaintiff,

v.

G.C.S., Inc., and I.S.C.
Inc.,

Defendants
and Third-Party Plaintiffs,

v.

Arthur G. McKee & Company,

Third-Party Defendant.

Civil Action No. 75-351

ORDER

Upon consideration of the motion by Third-Party Defendant Arthur G. McKee & Company to strike Third-Party Plaintiffs' Pretrial Narrative Statement and for Other Relief,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. McKee's Motion to Strike Third-Party Plaintiffs' Pretrial Narrative Statement is denied.

2. McKee's Motion to Reopen Discovery is denied.

3. McKee's Motion to Sever the Third-Party Action and to Transfer that action to the Northern District of Illi-

nois or alternatively to bifurcate and stay that action pending the resolution of the earlier filed related cases now pending in the Northern District of Illinois is denied.

4. McKee's Motion to Transfer this entire proceeding to the Northern District of Illinois is denied.

Dated: July 21, 1976

/s/ Daniel J. Snyder, Jr.

United States District Judge

APPENDIX 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ARTHUR G. MCKEE & COMPANY,
a Delaware corporation
registered to do business in
Illinois,

Plaintiff,

v.

G.C.S., INC., a Pennsylvania
corporation,

Defendant.

No. 75 C 1578

DECISION ON DEFENDANT'S
MOTION TO TRANSFER

Defendant has filed a motion to transfer this breach of contract case to the Western District of Pennsylvania pursuant to 28 U.S.C. §1404(a). Another suit i pending there against the defendant arising out of the same contract, and the plaintiff has been made a third-party defendant. That case apparently cannot be transferred here.

The contract provides in par. 36 of its General Terms and Conditions that the contractor (plaintiff) has the right to settle disputes "before a single forum selected by the Contractor", providing that the sub-contractor has a "reasonable" opportunity to be represented and heard. This provision was included in the plaintiff's Bid Inquiry and was never objected to by either party during negotiations extending over approximately four months although

the provision was eliminated by agreement with at least one sub-contractor. Therefore, under *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the principal question is whether enforcement of the clause is reasonable in this particular case.

In *Bremen,* the court said at 407 U.S. p. 15, 18:

> . . . in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside. . . . The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.
>
> • • •
>
> . . . it should be incumbent upon the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.

The defendant asserts that it would be unreasonable to require it to defend this suit here, not only because of the related case now pending in the Western District of Pennsylvania but also because most of the witnesses upon whom the defendant will rely are residents there. Defendant's affidavits state that 45 of its 46 essential witnesses reside in the Western District of Pennsylvania and that 20 of these are employed by persons who are not parties and are not subject to subpoena here. The evidence will concern a project which is located in that District. Defendant has also pointed out that the suit by a subcontractor in

the Western District of Pennsylvania to which the plaintiff is a defendant cannot be removed to this District and that other sub-contractors are not subject to suit here. None of these arguments would effectively deprive the defendant of its day in court, taking into consideration the frequency of voluntary appearances in this jurisdiction and the availability of video tape or written depositions. (407 U.S. at p. 19).

Plaintiff's affidavit shows that many of its witnesses live in the Northern District of Illinois and that at least eight of them are no longer under the control of the plaintiff. It has also shown that its records were to be returned to Chicago in September 1975, shortly after the project is completed. Furthermore, if the plaintiff should find its sub-contractors to be necessary parties, the principal ones are located in the Northern District of Illinois, including the plaintiff in the Pennsylvania suit.

The plaintiff ordinarily is entitled to choose its forum, in the absence of unfairness or compelling reasons to the contrary, and this right is fortified by the forum-selection clause of the contract. The plaintiff as an international construction firm has a valid reason for attempting to centralize its disputes in a single forum, and there is no evidence that this clause was negotiated unfairly or by means of undue influence or unequal bargaining power. Therefore, under the *Bremen* test, the inconvenience on the defendant does not rise to unfairness and is not sufficient to require transfer of this case to Pennsylvania. Any issues which are litigated or discovered in Pennsylvania between the parties hereto should not be re-litigated or rediscovered herein, however.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendant to transfer

is denied, and it is ordered to file a responsive pleading to the complaint within two weeks (14 days) hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's motion to strike the affidavit sent to the court by letter without leave is granted pursuant to Local Rule 12 and F.R.C.P. 7(b).

ENTER:

/s/ Thomas R. McMillen

Judge, U. S. District Court

DATED: Nov. 7, 1975

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

G.C.S., Inc.,

Plaintiff,

v.

Arthur G. McKee & Company,

Defendant.

Civil Action No. 75-604

ORDER OF COURT

The motion of Arthur G. McKee & Company to stay the above proceeding or, in the alternative, to transfer said action to the Northern District of Illinois, Eastern Division, having come on for argument before the Court on Friday, February 20, 1976, and the Court having heard counsel for both parties and having considered the matters set forth in said motion and in the Exhibits attached thereto, as well as the matters contained in the Answer and Supplemental Answer of G.C.S., Inc. to said motion and in the affidavit of William C. Bergmark and Exhibits attached thereto filed with said Supplemental Answer, as well as the matters submitted by the parties to the Court in their respective memoranda in support of and in opposition to said motion, including the documents attached as Exhibits to said memoranda, the Court finds and concludes as follows:

1. On May 16, 1975, Arthur G. McKee & Company ("McKee") and G.C.S., Inc. ("GCS") each filed suits against

the other, McKee filing as Plaintiff against GCS in an action commenced in the United States District Court for the Northern District of Illinois, Eastern Division, at No. 75-C-1578 and GCS filing as Plaintiff against McKee in an action commenced in the United States District Court for the Western District of Pennsylvania at No. 75-604. The claims asserted by the Plaintiff in each of these actions arise out of the same transactions or occurrence, that is, a subcontract awarded by McKee to GCS under which GCS was to furnish certain materials, labor and equipment incident to certain piping and equipment installation work being performed by McKee as General Contractor at the Clairton Works of the United States Steel Corporation in Clairton, Pennsylvania.

2. On June 2, 1975, McKee filed a motion in this action in which it asked, for reasons set forth in said motion, that this action be stayed pending all proceedings in the Illinois action which McKee had commenced against GCS or, in the alternative, that this action be transferred to the United States District Court for the Northern District of Illinois, Eastern Division, so that it could be consolidated with the earlier filed action pending there.

3. On June 6, 1975, GCS moved in the Illinois action for a transfer of that action to the Western District of Pennsylvania so that the Illinois action could be consolidated with the within action.

4. At that time, McKee withdrew its pending motion and, on July 2, 1975, filed an Answer to Plaintiff's Complaint. In the Second Defense of said Answer, McKee preserved and reiterated its objections to venue and the other grounds upon which it had based its earlier motion for stay or transfer. In addition, McKee raised the objection that the claims asserted in this action by GCS, should

have been asserted by GCS as a Counterclaim in the Illinois action, by reason of FRCP 13(a).

5. Thereafter, both GCS and McKee filed extensive factual affidavits and briefs in the Illinois action with respect to the issues raised in that Court by GCS's Motion to Transfer that case to this Court. Virtually all, if not all, of said materials have been submitted to this Court for its consideration in connection with McKee's Motion to Stay or to Transfer these proceedings.

6. On November 7, 1975, the Honorable Thomas R. McMillen entered an Order in the Illinois action denying GCS's Motion to Transfer. In his decision, Judge McMillen stated, *inter alia,:*

> "The defendant . . . [GCS] . . . asserts that it would be unreasonable to require it to defend this suit here, not only because of the related case now pending in the Western District of Pennsylvania but also because most of the witnesses upon whom the defendant will rely are residents there. Defendant's affidavits state that 45 of its 46 essential witnesses reside in the Western District of Pennsylvania and that 20 of these are employed by persons who are not parties and are not subject to subpoena here. The evidence will concern a project which is located in that District. Defendant has also pointed out that the suit by a subcontractor in the Western District of Pennsylvania to which the plaintiff . . . [McKee] . . . is a defendant cannot be removed to this District and that other subcontractors are not subject to suit here. None of these arguments would effectively deprive the defendant of its day in court, taking into consideration the frequency of voluntary appearances in this jurisdiction

and the availability of video tape or written depositions. (407 U.S. at p. 19).

"Plaintiff's . . . [McKee] . . . affidavit shows that many of its witnesses live in the Northern District of Illinois and that at least eight of them are no longer under the control of the plaintiff. It has also shown that its records were to be returned to Chicago in September 1975, shortly after the project is completed. Furthermore, if the plaintiff should find its sub-contractors to be necessary parties, the principal ones are located in the Northern District of Illinois, including the plaintiff in the Pennsylvania suit.

"The plaintiff ordinarily is entitled to choose its forum, in the absence of unfairness or compelling reasons to the contrary, and this right is fortified by the forum-selection clause of the contract. . . ."

7. On the basis of his findings and conclusions, Judge McMillen, on November 7, 1975, entered an Order denying GCS's Motion to Transfer the Illinois action to the Western District of Pennsylvania.

8. On December 2, 1975, McKee filed its Motion to Stay or Transfer this action to Illinois. In said motion, McKee alleged among other grounds, that principles of comity and judicial economy mandated that this Court should not re-litigate the issues which GCS had voluntarily submitted to Judge McMillen for decision in the action pending in the Northern District of Illinois.

9. On January 8, 1976, GCS filed an Answer to said motion in which it asserted, among other things, that the motion was premature for the reason that GCS was going to seek re-consideration of Judge McMillen's Order. In said Answer and in a Supplemental Answer filed on January 16, 1976, GCS set forth at length the matters on which

it was to seek re-consideration in the Illinois Court and again asked that this Court hold McKee's motion in abeyance in order to permit appropriate documents to be filed with the United States District Court for the Northern District of Illinois.

10. On January 28, 1976, after such additional documents had been submitted to the Illinois Court, Judge McMillen denied GCS's Motion for Reconsideration. Referring to the principal ground on which GCS sought such relief, namely, GCS's newly stated claim that the forum-selection provision invoked by McKee had not been agreed to by GCS, Judge McMillen determined that he did not find it necessary for him to resolve this dispute, stating:

> ". . . the facts wouldn't change any. The question is whether this is the more convenient forum, and I decided that McKee had a right to try the case in Chicago where its principal office is, and where a number of its witnesses are, and a number of the subcontractors are, and whether or not this was in the contract doesn't affect that."

11. In the circumstances here presented, Rules of comity and orderly judicial administration make it inappropriate for this Court to reconsider the matters which GCS has already submitted to Judge McMillen and to reach a different result.

For the reasons stated above, it is Ordered that this action be transferred to the Northern District of Illinois, Eastern Division, where it may be consolidated with the action now pending at No. 75-C-1578.

March 19, 1976

/s/ Herbert P. Sorg
Chief District Judge

APPENDIX 7

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

HONEYWELL, INC.,

Plaintiff,

vs.

G.C.S., INC., I.S.C., INC.,
and TRAVELERS INDEMNITY CO.,

Defendants,

and

ARTHUR G. McKEE & COMPANY,

Additional Defendant.

No. GD 75-17913

OPINION

WATSON, J.

This matter comes before the Court upon the petition of the Additional Defendant, Arthur G. McKee & Company, for the entry of an order either dismissing, staying, or severing and staying the Original Defendants' Complaint against McKee.

The present case is part of a complex set of law suits involving numerous claims and counterclaims arising out of a multi-million dollar construction project at an Ammonia and Sludge Removal Facility for the United States Steel Corporation at Clairton, Pennsylvania. Apparently McKee and G.C.S. contracted for the installation of certain piping at the aforementioned U.S. Steel facility. Contractual problems arose and many suits were filed with the present and other parties in the Northern District of Illinois, and the Western District of Pennsylvania and the Common Pleas Court of Allegheny County.

McKee has argued, in support of its present petition, that this Court is not the appropriate forum in which to have a determination made of the claims included in the complaint, and that the assertion of such claims by the original defendants is contrary to and inconsistent with the provisions of the basic contract on which such claims are grounded. The original defendants have vigorously opposed the petition to dismiss, stay or sever and stay.

Specifically, McKee contends that the forum selection clause (clause #36, entitled "Disputes") in the contract between G.C.S. and McKee gives McKee the option to select a single forum for the resolution of all disputes under the contract between G.C.S. and McKee. McKee has filed suit against G.C.S. in the Northern District of Illinois and contends that that should be the forum for the decision of all claims between the parties.

The Court's attention is drawn to a case in which the present petitioner, McKee, raised the identical argument for severance and stay as it is presently arguing before this Court. In *McJunkin Corporation* v. *G.C.S., Inc.* v. *Arthur G. McKee & Company* at Civil Action No. 75-351 (W.D. Pa.), Judge Snyder refused McKee's petition and found that the forum selection clause did not apply to actions brought by third parties (as Honeywell is in the present case); and that there can be no compulsory counterclaim on the part of G.C.S. unless and until the third party claim has been finally litigated.

Logic dictates that all matters between Honeywell, G.C.S. and McKee be settled in one action. The rights and

liabilities of all parties determined together, in the same manner that they will be in *McJunkin, supra.* McKee has cited a case which is clearly distinguishable from the instant case, *G.S.C., Inc.* v. *McKee,* Civil Action No. 75-604 (W.D. Pa.). Therein, the Western District Court (per Sorg, J.), applying principles of comity, transferred G.C.S.'s action to the Northern District of Illinois in accord with that District's ruling in *McKee* v. *G.C.S.* In *McKee* v. *G.C.S.,* the Court used the forum selection clause to permit McKee to select Illinois as the forum to decide issues pending between the parties. The salient distinguishing feature of *McKee* v. *G.C.S.* from *Honeywell* v. *G.C.S.* v. *McKee* is that Honeywell is a third party action, as was pointed out above in relation to McJunkin, supra, and that type of action is not controlled by a forum selection clause in a contract wherein Honeywell was not a party.

Therefore, the following:

ORDER OF COURT

AND NOW, to wit, this 4 day of June, 1976 IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Additional Defendant's Petition for Severance, Dismissed, Stayed or Other Relief be, and the same hereby is, denied.

Case to proceed *sec leg sec reg.*

BY THE COURT

/s/ Watson, J.

Supreme Court, U. S.
FILED
FEB 14 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-979

ARTHUR G. McKEE & COMPANY,
Petitioner,

v.

G.C.S., INC., I.S.C., INC., McJUNKIN CORPORATION,
and the HON. DANIEL J. SNYDER, JR.,
United States District Judge for the
Western District of Pennsylvania,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-979

ARTHUR G. McKEE & COMPANY,
Petitioner,

v.

G.C.S., INC., I.S.C., INC., McJUNKIN CORPORATION,
and the HON. DANIEL J. SNYDER, JR.,
United States District Judge for the
Western District of Pennsylvania,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

G.C.S., Inc. and I.S.C., Inc., Respondents, file the following Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Arthur G. McKee & Company, which Petition seeks review of the Judgment Order of the United States Court of Appeals for the Third Circuit entered, after oral argument, on October 28, 1976.

QUESTIONS PRESENTED

1. Whether this Court ought to grant review of a refusal by the circuit court to overturn certain discretionary pretrial orders of the trial court, relating to matters of severance, stay, transfer and discovery.

2. Whether this Court ought to grant review of a judgment order of the Court of Appeals for the Third Circuit, relating to certain pretrial procedural matters, when the prerequisites of Rule 19 of this Court are not satisfied.

STATEMENT OF THE CASE

Introduction

Petitioner seeks review by this Court of the refusal by the United States Court of Appeals for the Third Circuit to overturn certain pre-trial orders of the district court involving an exercise of its discretion and relating to severance, transfer, stay, and discovery. Petitioner urges that there is *no* basis upon which the Third Circuit could affirm these pre-trial procedural determinations of the trial court and that there is *no* basis upon which this Court could affirm the Judgment Order of the Third Circuit. See *Ryerson v. United States*, 312 U.S. 405, 408 (1941). Furthermore, since the Third Circuit was requested by this same Petitioner, by means of a Petition for Writ of Mandamus and otherwise, to exercise its discretion, which request was granted, any review granted by this Court would be limited to an examination of whether or not the Third Circuit acted arbitrarily or abused its discretion. *See Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

Petitioner represents that there is a conflict between three district judges and one state court judge (Petition 4, 9-12), an anemic adaptation of the normal assertion of a conflict between courts of appeal. The fact is that those judges who have considered the "Disputes Clause" relied upon *in toto* by Petitioner have all agreed that, while this particular clause may, in a given case, apply to direct actions involving the Petitioner and Respondent G.C.S., Inc., that, *under the circumstances of this case*, it did not require transfer, severance or stay. Plain and simple, there is no dispute whatsoever among the federal and state trial courts cited by the Petitioner.

Petitioner further represents that the district court, in the person of Respondent, the Honorable Daniel J. Snyder,

Jr., did not respect the decision of this Court in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). (Petition 4-5, 10, 13-16). This is clearly not the case. Judge Snyder specifically recognized and specifically applied the *Bremen* decision. (App. 5, 8). Furthermore, he has enforced forum-selection clauses in other cases, quoting extensively from *Bremen*. *Spatz v. Nascone*, 364 F. Supp. 967, 975-80 (W.D. Pa. 1973) (Snyder, J.). Giving thoughtful analysis and due consideration to the parties and issues before him in this case, however, and to the judicial and administrative factors, including the "Disputes Clause," in favor of and contrary to the motions presented, Judge Snyder exercised his discretion and declined to grant the relief requested (severance, stay, transfer, discovery). (App. 8-10, 13-14, 15-16). It is Judge Snyder's exercise of discretion which Petitioner questioned unsuccessfully before the Third Circuit and which Petitioner now wishes this Court to review.

Stripped of Petitioner's representations, then, it is clear that Petitioner seeks immediate appellate review of certain pre-trial orders, relating to severance, stay, transfer and discovery, which matters traditionally have been found to be within the province of the trial court. There being no conflict below or with any decision of this Court, therefore, and the requisites of Rule 19(1)(b) of the Rules of this Court not having been otherwise satisfied by Petitioner, the Petition for Writ of Certiorari should be dismissed. As implicitly recognized by the Third Circuit in its Judgment Order of October 28, 1976, to grant pre-trial review in such instances would constitute a derogation of the trial court's proper function and would accomplish the delay which Petitioner seeks.[1]

[1]The countless motions and procedural manuverings resorted to by the Petitioner as a means of postponing any trial in this matter are described in detail on pages 5-8 *infra*. under the heading of "Procedural Summary."

Narrative Summary

In late 1973 and early 1974, the plaintiff below, Respondent McJunkin Corporation, a supplier of pipe, valves and fittings, and Petitioner Arthur G. McKee & Company negotiated the sale and purchase of the industrial valves required for the construction of a water purification facility at Clairton, Pennsylvania. McKee was under contract to the United States Steel Corporation to design and construct said facility on a "turn-key" basis.

Thereafter, in January, 1974, McKee selected Respondent G.C.S., Inc. as its piping subcontractor. In April, 1974, G.C.S. and McKee executed a written subcontract. The written McKee-G.C.S. subcontract incorporated by reference certain "Subcontract General Terms and Conditions" and certain "Supplementary Subcontract General Terms and Conditions", which were pre-printed provisions used by McKee in connection with all subcontracts. These form provisions were neither attached to the written subcontract nor discussed by the parties. One of the "Subcontract General Terms and Conditions" is the "Disputes Clause" upon which the entire Petition for Writ of Certiorari is bottomed. Subsequent to the execution of that subcontract, McKee assigned its valve purchase order with McJunkin to G.C.S.

McKee revised its engineering throughout the Clairton project. These revisions, and McKee's early uncertainty as to valve requirements, were two factors which created significant excesses in valves. Accordingly, during the course of the project, McKee and McJunkin both assured G.C.S. that either McKee or McJunkin would take back the excess valves.

Following the completion of G.C.S.'s piping subcontract, McJunkin filed the instant suit against G.C.S. for valves delivered but for which no payment had been received.

G.C.S. denied liability for same and joined McKee, alleging that the valves in question were McKee's and/or McJunkin's responsibility.

Procedural Summary

A. DISTRICT COURT:

Judge Snyder first considered the applicability of the "Disputes Clause" in December, 1975, when, on December 29, 1975, McKee filed a Motion to Sever and Transfer the Third-Party Claim of G.C.S. Following an initial brief, oral argument and a reply brief by McKee, in which McKee asked Judge Snyder to exercise his discretion (App. 9), Judge Snyder filed his Opinion and Order of March 22, 1976 denying the relief requested. (App. 3). In the course of considering the various factors raised by McKee in support of its motion, Judge Snyder found that the G.C.S. third-party claim over against McKee was a derivative action squarely within the framework of Rule 14(a) of the FEDERAL RULES OF CIVIL PROCEDURE. (App. 8). He further found that the "Disputes Clause" did not, by its very terms, apply to an independent action commenced against either McKee or G.C.S. by a third-party (McJunkin) (App. 8), and that, under the circumstances of this case, it would not be appropriate to accomplish the result (severance, stay or transfer) requested by McKee (App. 8).[2] Above all, Judge Snyder recognized that he was confronted by the competing interests of three different parties and that he would have to consider those interests in the context of orderly judicial administration. (App. 8). In his judgment, the interests of all concerned could be best protected if disputes arising out of the McJunkin-McKee valve purchase order were isolated from the much more complex litigation involving G.C.S. and McKee. (App. 9-10).[3] Judge Snyder further stated (App. 8-

[2]See discussion of "Disputes Clause" on pages 12-13 *infra*.
[3]See discussion of other litigation on pages 8-9 *infra*.

10), and he has repeatedly assured all counsel, that the trial of this case will not involve issues unrelated to the valve purchase order.

McKee next filed a Motion for Reconsideration on April 14, 1976. This motion requested reconsideration of the earlier motion to sever and also moved for a transfer of the entire proceeding pursuant to 28 U.S.C. §1404(a). In its motion McKee asserted that Judge Snyder's March decision was premised upon "fundamental mistakes of fact" which "mistakes of fact" were highlighted in the Motion for Reconsideration, including McKee's belief that the G.C.S. third-party claim over was not derivative in nature and that the "Disputes Clause" did apply to third-party actions. Again, Judge Snyder heard oral argument on the question.

On May 7, 1976, before Judge Snyder had ruled on the Motion for Reconsideration, McKee filed an Amended Motion to Bifurcate and Stay the Third-Party Action. This third motion raised the contentions previously argued by McKee with only a slight modification in the relief requested. (App. 11-12).

On June 18, 1976, Judge Snyder filed an Opinion and Order denying the outstanding requests (severance, stay, transfer). (App. 11). In his Opinion, Judge Snyder again explained that in his judgment, under the various circumstances of this case, that liability for deliveries pursuant to the McJunkin purchase order should be determined in his courtroom. (App. 12-14). No appeal was taken from this ruling or the March ruling. Instead, in the course of a June 15, 1976 Status Conference, McKee consented to a September 27, 1976 trial date.[4]

[4]At the Status Conference Judge Snyder advised all parties as to his position regarding McKee's outstanding motions, anticipating his June 18, 1976 Opinion and Order. (R.).

Notwithstanding the scheduled trial date, McKee "renewed" its earlier motions on July 6, 1976 in the form of a Motion to Strike the Pre-trial Narrative Statement of G.C.S. McKee also sought, in the alternative, to limit the issues to be tried or to reopen discovery. Again, McKee filed a brief in support of its Motion to Strike, asserting for the fourth time the matters originally raised in its December, 1975 Motion to Sever and Transfer. On July 21, 1976, Judge Snyder entered an Order denying McKee's Motion to Strike. (App. 15).

B. THIRD CIRCUIT:

More than thirty days after Judge Snyder's Orders of March 22, 1976 and June 18, 1976, McKee appealed to the United States Court of Appeals for the Third Circuit. To avoid the expired statutory appeal period, McKee styled its appeal as being from the July 21, 1976 Order of Judge Snyder, which Order denied McKee's "renewed" motions to sever and transfer.

Concurrently, McKee filed a Petition for Writ of Mandamus to the same appellate court, raising the matters now pressed in its Petition for Writ of Certiorari. The Third Circuit disposed of both matters, when, on October 28, 1976, following oral argument, it dismissed both the Appeal and the Petition for Writ of Mandamus. (App. 1) Like Judge Snyder, the Third Circuit has had an occasion to follow the *Bremen* decision. *See Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757-58 (3rd Cir. 1973).[5]

In summary, then, McKee first attempted to have the Third Circuit substitute its judgment for that of Judge Snyder; it now seeks to have this Court do the same.

[5]Indeed, this Court relied on precedent in the Third Circuit in rendering the *Bremen* decision. 407 U.S. at 10, n.11, citing *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (3rd Cir. 1966).

Other Litigation

On May 16, 1975, G.C.S. and McKee commenced suits against each other in the United States District Court for the Western District of Pennsylvania ("G.C.S. Case") and in the United States District Court for the Northern District of Illinois ("McKee Case"), respectively. As a means of transfering the McKee Case to Pennsylvania where it could be more conveniently tried and where it could be consolidated with the G.C.S. Case and with the instant suit filed by McJunkin, G.C.S. moved to transfer under 28 U.S.C. §1404(a).[6] McKee resisted, notwithstanding its joinder in the instant suit, and the matter was heard by the Honorable Thomas R. McMillen of the Northern District of Illinois. Relying heavily upon the "Disputes Clause" *as it applied to the suit filed by McKee against G.C.S.*, Judge McMillen denied the transfer request in November, 1975. (App. 17).

Thereafter, on March 19, 1976, the Honorable Herbert P. Sorg granted McKee's transfer of venue motion in the G.C.S. Case. He did so exclusively on the basis of comity. (App. 25). Chief Judge Sorg did not make any findings or draw any conclusions as to the applicability of the "Disputes Clause," with respect to third-party actions or otherwise, as same were not necessary to his decision. (*Id.*)

On July 30, 1975, Honeywell, Inc. initiated suit against G.C.S. in the Court of Common Pleas of Allegheny County, Pennsylvania ("Honeywell Case"), seeking monies allegedly owed for instrumentation work performed on the Clairton

[6]There were numerous factors in favor of the Pennsylvania forum. For example, subcontract performance over more than a year's time was in Clairton, Pennsylvania, all but one of G.C S.'s 46 witnesses resided in that locale including 20 persons employed by non-parties who were not subject to subpoena in Illinois, the construction records were there, and a viewing by the jury might well be required due to the complexity and scope of the project. (R. , *see* App. 18-19).

Project. McKee was joined by G.C.S. as an additional defendant in October, 1975. On May 18, 1976, McKee attempted to sever and stay G.C.S.'s claim over for the same reasons presented to Judge Snyder. That court, in the person of the Honorable Warren Watson, denied McKee's request for one of the reasons cited by Judge Snyder: this "Disputes Clause" did not apply to actions commenced by third parties who were not parties to the McKee-G.C.S. subcontract. (App. 28). On this basis Judge Watson specifically distinguished the approach of Judge McMillen in the McKee Case; he further noted the comity underpinning of Judge Sorg's determination in the G.C.S. Case. (App. 28).

REASONS WHY WRIT SHOULD NOT BE GRANTED

THE THIRD CIRCUIT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING PETITIONER'S CONTENTIONS

A. Rule 14, Discretion and the "Disputes Clause"

As Petitioner correctly points out, "*Bremen* does not mandate applying a rigid rule that would require enforcement of forum-selection clauses in all situations." (Petition 15). Specifically, the thrust of the *Bremen* decision is to suggest that forum-selection clauses are generally enforceable where bargained for and where enforcement would be reasonable under the particular circumstances. 407 U.S. at 12-13. It contains no explicit directive to the federal courts to enforce such clauses notwithstanding any other factors. Thus, the application of the "Disputes Clause" in the context of a third-party claim under Rule 14 of the FEDERAL RULES OF CIVIL PROCEDURE, and in the context of motions for severance, stay and transfer (under 28 U.S.C. §1404(a)) must be examined, and was examined by Judge Snyder in this case, in light of the rationales and policies underlying these provisions.

The policies underlying Rule 14(a), have been identified as follows: "to avoid two actions which should be tried together, to save the time and cost of a reduplication of evidence, to obtain consistent results from identical and similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant". 3 J. Moore, FEDERAL PRACTICE §14.04 (2d Ed. 1974), and cases cited therein. Judge Snyder was cognizant of this policy when he stated that "retention of this third-party claim within the confines of this purchase order suit will isolate the supplier, contractor and subcontractor, and will provide for the expeditious resolution of this distinct problem between the parties." (App. 9). Judge Snyder properly exercised his discretion in applying Rule 14(a) by treating the "Disputes Clause" as one of the factors to be considered and finding that it did not override all other considerations.

The Third Circuit affirmed Judge Snyder's application of Rule 14(a) under the particular circumstances of this case. Mr. Justice Brennan's statement in *Appalachian Power Co. v. American Institute of Certified Public Accountants*, 80 S. Ct. 16, 4 L. Ed. 2d 30, 32 (1959) (Opinion in Chambers), therefore becomes directly applicable. In denying a petition for stay, Mr. Justice Brennan stated:

> "But ordinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts."

The policies underlying discretionary transfers of venue under 28 U.S.C. §1404(a) can be summarized best in the words of that statute, namely, to provide for the "convenience of parties and witnesses" and "in the interest of justice". The existence of a contractual forum-selection clause has been held to mitigate the importance of the element of convenience, but has not moved the courts to ignore all the other factors present. *See, e.g., Plum Tree, Inc. v. Stockment*, 488 F.2d 754, 757-58 (3d Cir. 1973). Indeed, acceptance of Petitioner's position would be contrary to the "factor inquiry" required by this Court in 28 U.S.C. §1404(a) cases. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

The Third Circuit affirmed Judge Snyder with full awareness of *Bremen*. *See, e.g., Plum Tree Inc. v.*

Stockment, 488 F.2d at 757-58. It found no abuse of discretion in Judge Snyder's interpretation of the precedential authority of *Bremen* under the circumstances of this case. When one examines the discretionary and "reasonableness" language of the *Bremen* opinion, and when one considers that motions for severance, transfer, stay and discovery require the exercise of discretion by the trial court, the positions of Judge Snyder and the Third Circuit are unquestionably sound. Accordingly, there is no order in this case which is contrary to the *Bremen* decision.

G.C.S. also directs this Court's attention to the requirements of the "Disputes Clause." Unlike a true forum-selection clause, there is no single forum for resolution designated, either directly or indirectly, by the parties. To the contrary, the "Disputes Clause" is merely precatory by design and in its language: it describes an optimum but acknowledges that that optimum may not be practical. Thus, the introductory paragraph, which sets the tone and purpose for the entire "Disputes Clause", reads:

> 36. DISPUTES: *It is the general intention* of the parties that any dispute relating to this Subcontract or the Prime Contract or involving a matter or question of law or fact common to them or the parties thereto shall be settled, *to the extent feasible*, before a single forum selected by Contractor, and a decision by such forum with respect to any such question or matter shall be binding on Subcontractor, provided *that it has a reasonable opportunity to be represented and heard. To this end:* [Emphasis added.]

Consistent with this proviso, subparagraph (b) of the clause states that the forum selected is to be a "reasonable" one which can "best determine and settle *most aspects*" of the

dispute, provided G.C.S. shall have "the opportunity for adequate representation." (Emphasis added).[7]

Moreover, Petitioner conveniently ignores the fact that the "Disputes Clause" concentrates solely on disputes between G.C.S. and Petitioner and Petitioner and the "Owner", the United States Steel Corporation, *not* unidentified third parties who are not signatories thereto. This conclusion is based on the language in the introductory paragraph quoted above, to the effect that the scope of the clause is limited to disputes:

> "...relating to [the G.C.S.-McKee subcontract] or the [McKee-USS contract] or involving a matter or question of law common to them *or to the parties thereto...*" [Emphasis added.]

Given these features of the "Disputes Clause" G.C.S. submits that Judge Snyder's decision, and that of the Third Circuit, cannot be attacked on any basis. The clause in question simply does not apply, *by its very terms*, to the case before this Court. Accordingly, it can never be said that the existing orders are in conflict with *Bremen*. For this additional reason, therefore, McKee cannot sustain its Rule 19 burden of showing that the Court of Appeals decision upholding Judge Snyder was in conflict with *Bremen*.

B. "Collateral Order Rule"

McKee does not articulate the ground for this Court's granting of the Petition based upon its second line of argument. (Petition 16-19). G.C.S. can only presume that Petitioner's position is to the effect that by dismissing Petitioner's appeal the Third Circuit has rendered a decision

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[7]Portions of the "Disputes Clause" are contained on pages 7-8 of the Petition. As noted by Judge Snyder (App. 8), the "Disputes Clause" as written is an expression of a hoped for result and not an expression of an absolute covenant. Indeed, its precatory language anticipates its very non-applicatic n in situations such as the instant case.

in conflict with certain decisions of this Court, namely, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449 (1935).

The *Cohen* decision marked the emergence of the so-called "collateral order" expansion of the rule that only final orders are appealable as of right to the courts of appeal under 28 U.S.C. §1291. Since the decision in *Cohen*, the collateral order rule has evolved into an analytical framework which prescribes "some evaluation of the competing considerations underlying all questions of finality — 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) ..." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974). Thus, in addition to the mandatory presence of the four criteria cited in *Cohen* (*see* 337 U.S. at 546-67), the collateral order rule also contemplates a general balancing test between the competing considerations cited by Mr. Justice Powell in *Eisen*, suggesting a range of discretion to be left with the Third Circuit in applying the rule.

If it is assumed that the Third Circuit in its Judgment Order of October 28, 1976, did not reach a finding on the merits, which McKee implies and which G.C.S. does not concede, G.C.S. submits that the Third Circuit's decision to dismiss McKee's appeal was a proper exercise of its discretion in that the collateral order rule did not apply in the instant case. The decision of the Third Circuit in this case is also consistent with that court's general perception of the scope of application of the collateral order rule. *See Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert denied*, 423 U.S. 832 (1975); *Nolfi v. Chrysler Corp.*, 324 F.2d 373 (3d Cir. 1963). The Court of Appeals decision is not, therefore, in conflict with *Cohen*.

With regard to McKee's argument based on *Shanferoke, supra*, suffice it to say that the Third Circuit could properly dismiss Petitioner's appeal from Judge Snyder's denial of the motion to stay on either of two grounds. First, McKee's defense, if any, based on the "Disputes Clause" is not truly an equitable one. Rather, it is based on an alleged contractual right to litigate in another court and is distinguishable from the right to arbitration deemed to be an equitable defense in *Shanferoke* and its progeny. Second, the Third Circuit properly applied the rule in *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935), where this Court distinguished a request for stay from an injunction, by stating that when a court grants or denies a request to stay in an action before it, it is acting "by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice". 293 U.S. at 382.

In view of the foregoing, the Respondents submit that by dismissing McKee's appeal, the Third Circuit did not render a decision in conflict with any applicable decision of this Court and that it properly exercised its discretion.

CONCLUSION

Petitioner Arthur G. McKee & Company has not demonstrated that the October 28, 1976 Judgment Order of the Third Circuit is a decision on a federal question which is contrary to any applicable decisions of this Court; nor has it demonstrated a conflict between various courts of appeal; nor has it demonstrated any of the other bases upon which Writs of Certiorari are granted by this Court as set forth in Rule 19. Moreover, G.C.S. has demonstrated that both Judge Snyder and the Third Circuit properly exercised their respective discretionary functions in conscientiously carrying out their given responsibilities. The Petition should, therefore, be denied and this case should be permitted to go to trial without further delay.

Respectfully submitted,

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No. 76-979

In the Supreme Court of the United States

OCTOBER TERM, 1976

ARTHUR G. McKEE & COMPANY,
Petitioner,

v.

G.C.S., INC., I.S.C., INC., McJUNKIN CORPORATION, and the HON. DANIEL J. SNYDER, JR., United States District Judge for the Western District of Pennsylvania,
Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

Statement of Additional Facts

In its Brief in Opposition (at 4), G.C.S.* states:

> "Subsequent to the execution of [the McKee-G.C.S.] subcontract, McKee assigned its valve purchase order with McJunkin to G.C.S."

This is not true. On April 22, 1974, McKee assigned its valve purchase order with McJunkin to G.C.S. (App. 1a). On April 25, 1974, the McKee-G.C.S. subcontract was executed. (App. 2a). As correctly represented in the Peti-

*As in the Petition, we denominate respondents G.C.S., Inc. and I.S.C., Inc. together as "G.C.S." throughout this Reply Brief.

tion (at 5), G.C.S. expressly accepted the purchase order assignment as part of the McKee-G.C.S. subcontract. (App. 2a).

G.C.S. also states that Judge Snyder "has repeatedly assured all counsel, that trial of this case will not involve issues unrelated to the valve purchase order." (G.C.S. Brief, at 6). In fact, Judge Snyder has expressed doubt as to whether the trial could be so limited. (App. 4a, 7a, 8a).

To ensure that there is no misunderstanding as to what the basis for Judge Snyder's rulings was, we have printed in Appendix 3A the relevant portions of both McKee and G.C.S.'s arguments during the April 30, 1976 hearing on McKee's motion for enforcement of the McKee-G.C.S. forum-selection clause, the only hearing held in the district court. McKee directs the Court's attention particularly to one additional point in the transcript: Judge Snyder's statement recognizing that the effect of his ruling is to permit G.C.S. to use the device of a third-party complaint to try twice the claims asserted in its third-party complaint. (App. 6a).

ARGUMENT

I.

THE FORUM-SELECTION CLAUSE APPLIES TO THE THIRD-PARTY ACTION BELOW.

In suggesting that the McKee-G.C.S. forum-selection clause does not cover claims asserted in the third-party complaint below, G.C.S. is careful to quote the clause out of context. (G.C.S. Brief, at 13). As we pointed out in the Petition (at 7, 14), the plain language of the clause includes disputes which arise out of the McKee-G.C.S. subcontract and which involve third-parties. Judge McMillen noted that the McKee-G.C.S. valve dispute arose out of their subcontract (App. 17), and even Judge Snyder conceded that the third-party action was part of the larger McKee-G.C.S. contract dispute. (App. 13, 5a, 7a; *see* Petition, at 14). Moreover, as the Additional Statement of Facts above demonstrates, G.C.S. accepted total payment responsibility for valves as an express provision of the McKee-G.C.S. subcontract. (App. 2a).

II.

G.C.S. HAS ERRONEOUSLY CHARACTERIZED THE DISTRICT COURT'S ORDERS AS DISCRETIONARY RULINGS ON REQUESTS FOR SEVERANCE, STAY, OR TRANSFER.

In opposing the Petition, G.C.S. contends that since rulings on motions for severance, stay, or transfer of a lawsuit are traditionally within a trial court's discretion, the

rulings of the courts below may not be reviewed. (G.C.S. Brief, at 11-13). But what McKee seeks is enforcement of an agreement between itself and G.C.S. that all disputes arising out of the McKee-G.C.S. subcontract will be decided in one forum. That McKee seeks *relief* under the clause which would otherwise be discretionary does not alter this Court's holding in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972), that a forum-selection clause should be enforced absent a showing by the party seeking to escape the contract that enforcement would be unreasonable or unjust.

Roach v. *Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Cal. 1973) illustrates this point. In *Roach*, a longshoreman sued a shipowner for injuries incurred when some cargo fell on the longshoreman. The shipowner impleaded the cargo-owner for negligently packing the cargo. The manufacturer moved to dismiss the third-party complaint on the ground that the bill of lading for the cargo contained a forum-selection clause which required all disputes between the shipowner and the manufacturer to be resolved in Hamburg, Germany. 358 F. Supp. at 482.

As G.C.S. has done below (*see* App. 7a), the shipowner resisted dismissal on grounds that the third-party complaint arose out of its defense to the longshoreman's suit. Applying the *Bremen* rule, the district court dismissed the third-party complaint on grounds that the shipowner had not met its burden of "clearly show[ing]" that enforcement of the clause would be unreasonable or unjust. 358 F. Supp. at 484. As the decisions below reveal, the lower courts have not applied the *Bremen* test to McKee's request for enforcement of the McKee-G.C.S. forum-selection clause. It is their refusal to do so that McKee seeks to have reviewed.

Nor does *The Plum Tree, Inc.* v. *Stockment*, 488 F.2d 754 (3d Cir. 1973), render enforcement of the McKee-G.C.S. forum-selection clause discretionary, even assuming McKee only had requested transfer of the third-party action and not a stay as well.* As G.C.S. admits (G.C.S. Brief, at 11), in *Plum Tree* the Third Circuit indicated that a valid and reasonable forum-selection clause would be treated as a waiver of a party's right to assert its own convenience as grounds for avoiding trial in the contractual forum. 488 F.2d at 758. Since (1) McJunkin consented to enforcement of the clause, (2) Judge McMillen has held that the clause is valid and reasonable and that trial of disputes arising out of the McKee-G.C.S. subcontract will be more convenient in Illinois, and (3) under *Plum Tree*, the inconvenience a single trial of those disputes might cause G.C.S. is immaterial, nothing was left to Judge Snyder's discretion.

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* In fact, *Plum Tree* involved a situation identical to that faced by Judge McMillen in the *McKee case*: a defendant seeking to transfer a lawsuit out of a district despite a forum-selection clause between the parties which provided that their disputes would be resolved in that district. When the district court ordered the lawsuit transferred without considering either the validity of the clause under *Bremen* or any of the factors specified in 28 U.S.C. §1404(a), the Third Circuit vacated the transfer order and directed the district court to judge the validity of the clause as required by *Bremen* and then to rule on the transfer request as prescribed by the statute. 488 F.2d at 756-57. In view of Judge McMillen's prior evaluation of these factors, nothing in *Plum Tree* can be construed as justifying a second review of these factors by Judge Snyder and his reaching a result contrary to Judge McMillen's. *Accord, Ellicott Mach. Corp.* v. *Modern Welding Co.*, 502 F.2d 178, 181 (4th Cir. 1974).

The lower courts' refusal to enforce the McKee-G.C.S. forum-selection clause was not discretionary simply because motions for severance, transfer, or stay are normally left to trial courts. The decisions of the courts below are in direct conflict with the holding of *Bremen* and the policies behind it.

III.

THE THIRD CIRCUIT DID NOT DISMISS McKEE'S APPEAL FOR UNTIMELINESS.

G.C.S. implies in its Brief (at 7) that McKee's appeal was not from Judge Snyder's July 21, 1976 order and, therefore, that McKee's notice of appeal, filed August 11, 1976, was not timely. However, as noted in both the Petition (at 16) and the G.C.S. Brief (at 15), McKee's appeal was from Judge Snyder's refusal to stay the third-party action—a decision first entered on June 18, 1976 (App. 12), then reconsidered and affirmed on July 21, 1976 (App. 15-16). Thus, even if the appeal could be characterized as being taken from the earlier order, McKee's notice of appeal was filed within the additional thirty-day period for filing provided in F.R.App.P. 4(a). Under Third Circuit precedent, the appeal could not have been dismissed as untimely without first remanding the case to the district court for a decision on whether an extension should be granted. *Torockio* v. *Chamberlain Mfg. Co.*, 456 F.2d 1084, 1086-87 (3d Cir.) (en banc), *on remand*, 56 F.R.D. 82, 87-88 (W.D. Pa. 1972), *aff'd without opinion*, 474 F.2d 1340 (3d Cir. 1973). Therefore, G.C.S.'s suggestion that the Third Circuit dismissed McKee's appeal as untimely is not supported by the record.

CONCLUSION

This Petition presents two questions: (1) under this Court's decision in *Bremen*, can a party which cannot show that enforcement of a forum-selection clause would be unreasonable or unjust escape its agreement merely because the issue arises in the context of a third-party action? and (2) is a district court's refusal to enforce the clause in such a situation immediately appealable as of right? The prior decisions of the Illinois and Pennsylvania district courts in companion cases have resolved all subsidiary issues. There is no dispute that the instant clause is valid and enforceable as between McKee and G.C.S. There is no dispute that McKee's choice of the United States District Court for the Northern District of Illinois was reasonable, and that trial of the subcontract issues between McKee and G.C.S. can be had most conveniently in that forum. There is no real dispute * that the McKee-G.C.S. forum-selection clause expressly encompasses the claims asserted in the third-party complaint of G.C.S.

If permitted to stand, the lower courts' orders will result in expensive and duplicative litigation in at least two federal judicial circuits**—precisely what the McKee-

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* See p. 3 *supra;* App. 5a.

** *Cf. Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953).

G.C.S. forum-selection clause was intended to prevent—with no chance of consolidating the trials or appeals. For this reason and for the reasons stated above and in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 21, 1977.

APPENDIX

APPENDIX 1A

Excerpt from Assignment of McJunkin valve purchase order to G.C.S., dated April 22, 1974.

B/M 03-02-09 SUPPLEMENTAL SHEET NO. 1

This supplemental sheet is being issued to assign this purchase order to McKee's Piping Subcontractor on this Project, General Contracting Services Inc. (GCS). The consignment of all valves on the order is:

General Contracting Services Inc.
700 Elizabeth—Glassport Rd.
(Mailing address is P.O. Box 417)
Elizabeth, Pa. 15037
Phone: 412-384-4774

and the address for invoicing is:

General Contracting Services Inc.
3755 Library Rd.
Pittsburgh, Pa. 15234
Mr. Robert W. Christensen
Phone: 412-563-7900

McKee will continue working with you on the expediting of the valves on this order.

APPENDIX 2A

Excerpts from McKee-G.S.C. subcontract, dated April 25, 1974.

Page 4:

McKee Bill of Material 03-02-09 showing valves purchased by McKee is included for reference. Valves as shown have been pre-purchased by McKee who will also expedite valves. G.C.S. will receive and pay for all valves on this B/M as required for the installation of piping systems. G.C.S. will also order, purchase, expedite, receive and install any new valves required for the installation of the piping system as shown on McKee's Flow Sheet drawing.

Page 12:

ACCEPTANCE OF ORDER

We are sending you this order in duplicate with the request that you sign one copy and return it to us as your acceptance of all terms and conditions as set forth in this order.

It is understood and agreed that this contract may be revised from time to time to add or deduct material or to make other running changes in accordance with our usual practice or issuance of "Supplemental Sheets". If, for any reason, you object to the content of any of the aforementioned Supplemental Sheets, you shall notify us in writing within ten (10) days after receipt of same, giving reason for objection. Unless we receive this written objection, it shall be considered that the revisions are in accordance with the original order.

ACCEPTED:

By: /s/ Wm. G. Bergmark
Title: Pres. I.S.C. and Subsidiaries
Date: 4/25/74

APPENDIX 3A

Excerpts from hearing on April 30, 1976 in Pittsburgh, Pennsylvania before the United States District Court for the Western District of Pennsylvania.

MR. HARRIS[*]: It seems to me, Judge, that it will just—you know, try as hard as the Court would, I am sure, to keep the issues in this case simple and limited to the McJunkin complaint issue, it seems to me there is no way you do that involving McKee because McKee's defenses to the third-party complaint are all of the issues in the Chicago case. That is, we did not goof up the engineering. G.C.S. says to Your Honor, "If we have to pay for the McJunkin valves, McKee has to pay us because McKee goofed up the engineering." That issue right there is worth about three weeks of trial. In Chicago this issue of whether or not the engineering was faulty, whether or not if it was faulty it caused G.C.S. to order valves that it did not need, and, of course, the ultimate contract question, that if the engineering was faulty and if G.C.S. then ordered valves as a result of that faulty engineering, who has to pay for those valves under the McKee-G.C.S. contract. Those are all the issues in the Chicago case.

If we were to go to trial on the third-party complaint here, I would have to present extensive evidence to Your Honor in the way of setoffs saying even if Your Honor finds on some basis that McKee is liable to G.C.S. for something, for some value, we have several hundred thousand dollars of other claims in Chicago. We are entitled to assert those as a setoff to any liability that the Court might feel we had to G.C.S. in this case, and that would

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[*] Counsel for petitioner Arthur G. McKee & Company.

drag in, by way of the back door, all of those other Chicago issues which will involve very extensive litigation.

• • •

[THE COURT*:] Now, you make the statement here: "it is the retention of the third-party complaint which threatens to bury the McJunkin purchase order claims among unrelated issues."

MR. HARRIS: Well, let me explain what we intend to convey with that statement, Judge.

If the case before Your Honor is just McJunkin's complaint against G.C.S., and G.C.S.'s answer and counterclaim, then the only issues, as the Court pointed out at the outset, are: did McJunkin sell valves; did they deliver valves; did G.C.S. pay for them; and did McJunkin and G.C.S. have an agreement that valves could be returned. Very simple issues.

THE COURT: But, do you think that there would be any justice either to McJunkin or G.C.S. to limit the issues that way?

MR. HARRIS: Sure. That would seem to me to be the procedure that would be the clear justice for all of the parties. It is only when the contractual issues between G.C.S. and McKee come into the case that the case becomes very very complicated, and we have this risk that Your Honor will make a decision on a factual issue that perhaps will bind us in Chicago.

THE COURT: That just might.

MR. HARRIS: Sure, sure.

THE COURT: Just might.

And wasn't G.C.S. the assignee of the McKee purchase order?

MR. HARRIS: Yes, sir.

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* Respondent Hon. Daniel J. Snyder, Jr.

THE COURT: So that when you try to saddle G.C.S., you are trying to saddle them with the liability on the purchase order without any defense as to the relationships between G.C.S. and McKee.

MR. HARRIS: Well, Judge, you know, that is the issue that is involved in the two Chicago cases, the contractual issue.

THE COURT: It is the issue involved here too.

MR. HARRIS: That is right, Judge, and that is our point, that it ought not to be involved here. We have a contractual right to have the issues between G.C.S. and McKee under that contract tried in Chicago.

THE COURT: No, you have the contractual right to have claims between G.C.S. and McKee determined in Chicago.

MR. HARRIS: Yes, sir.

THE COURT: And if you notice, I cited a previous opinion of this Court on this whole choice, and I go for it very strongly because I think people have the right to so contract. But here was a prior purchase order. As I understand it, the purchase order was prior to the contract selection clause, and that contract selection clause never said anything about the claims of third parties growing out of contracts previously existing.

MR. HARRIS: That is incorrect, Judge, and let me explain why. The first purchase order was the McKee purchase order to McJunkin, and that did predate the G.C.S.-McKee contract. When the contract then was put together between McKee and G.C.S. with the forum selection clause, it was written into the contract that that valve order was assigned from McKee to G.C.S., and that G.C.S. accepted that assignment. That is in the contract between McKee and G.C.S., within the same four corners.

THE COURT: Binding how on McJunkin? We are not talking about what G.C.S. agreed to; we are talking about what McJunkin agreed to.

• • •

THE COURT: The amazing thing to me about this is that originally, at least, McJunkin also consented to the motion.

MR. HARRIS: Well, they consented not to the motion to send everything to Chicago—

THE COURT: No, I know.

MR. HARRIS: —they consented to the motion to sever and transfer. And I would guess if the Court would ask Mr. Houston[*] why he did that, why he consented, and why maybe he would consent again today—but I don't know—is that he doesn't want me out here in Pittsburgh spending three months trying the contractual issues between McKee and G.C.S. in his simple little valve case.

THE COURT: Well, it seems to me if everybody agrees, I wouldn't have any problem about transferring it. I seem to see or sense some dispute.

MR. HARRIS: Well, the dispute, though, Judge, is only between us and G.C.S. G.C.S. does not want the third-party complaint to go to Chicago.

THE COURT: They apparently want to try it twice.

MR. HARRIS: Yes, I am afraid they do. And I submit to the Court that you ought not to facilitate that not only because of the burden it will cause to me and to my client, but because of the burden that it will impose upon the Federal District Court in Chicago who will have to try to figure out what factual issues Your Honor has decided, what factual issues by way of res judicata or collateral estoppel are already decided as a result of this Court's decision in the third-party complaint. Those questions will not be questions that we and G.C.S. will agree upon, and the Federal District Court in Chicago then will have to review what Your Honor has done in the third-party complaint so that the Chicago court does not review Your

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* Counsel for respondent McJunkin Corporation.

Honor's decisions. Of course, the Court would not do that in Chicago anymore than Your Honor would purport to review district court judgments from Chicago. All of these issues will place an intolerable burden, I submit, upon us, my client, and I think upon this court and upon the Federal District Court in Chicago. It is only by severing out the third-party complaint and the issue, all of which involve the McKee-G.C.S. contract and performance thereunder, and getting those out to Chicago where they can all be tried at one time.

Valves are only a small part of the litigation. Valves are just material, one kind of material. There are excess materials of another kind, and the issues are all the same.

Does my client, McKee, bear a responsibility for excess material, whether it is valves, in this case, or pipe in the Chicago case, or something else in the Chicago case; does my client have to pay for that excess material because we goofed up the engineering.

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MR. KLABER[*]: Well, but we don't see why G.C.S. should be punished for the fact that a third-party action was brought by McJunkin in this jurisdiction. We certainly have the right to bring in all parties who are responsible over for any liability that G.C.S. may be found to have, and that is all we are asking to do. Apparently McKee is alleging, or suggesting a parade of horribles. I don't see how this lawsuit is going to have a lot of different tangents. True, engineering, is a small part of it.

THE COURT: I am afraid I can. I don't know.

MR. KLABER: The engineering, as to the valves, is only a small part of it. That doesn't require three weeks of trial.

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* Counsel for respondents G.C.S., Inc. and I.S.C., Inc.

THE COURT: But that isn't, as I understand it, that isn't what the third-party complaint is about. The third-party complaint in effect says, "Oh, but sure we got a bunch of these valves, but we couldn't use them. We had to ship them back. And the reason that we did, that we had to ship them back, was because of engineering mistakes."

MR. KLABER: Well, that is part of it.

THE COURT: Sure, that is part of it.

MR. KLABER: But it is a small part of it.

THE COURT: But then don't you get into the whole problem of what engineering mistakes which may have been in connection, for example, with other subcontractors work and had nothing to do with McJunkin?

MR. KLABER: That would be irrelevant. I don't see how that would get involved, Your Honor. I think the only question on engineering would be those valves which are involved in the McJunkin suit. If counsel wants to go beyond that, that is his choice, but I don't see that it is appropriate.

THE COURT: I think it would be though, but—

MR. KLABER: The only liability over would be imposed upon engineering related to this job, I guess.

THE COURT: Except insofar as affected by other engineering.